

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888  
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

**MOTION TO DISMISS THIS PROSECUTION  
FOR VIOLATION OF VIRGINIA CODE SECTIONS  
18.2-31(8) AND 18.2-53.1 AS BARRED  
BY FORMER JEOPARDY PURSUANT TO  
VIRGINIA CODE SECTION 19.2-294**

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and in support of his motion to dismiss this prosecution as barred by former jeopardy states as follows:

1. Virginia Code Section 19.2-294 states in pertinent part

if the same act be a violation of both a state and a federal statute a prosecution under the federal statute shall be a bar to a prosecution under the state statute. The provisions of this section shall not apply to any offense involving an act of terrorism as defined in §18.2-46.4.

For purposes of this section, a prosecution under a federal statute shall be deemed to be commenced with the return of an indictment by a grand jury or the filing of an information by a United States attorney. [Underlining added.]

2. Defendant Lee Malvo was charged by juvenile petitions on November 6, 2002 in Fairfax County, Virginia with two allegations of violation of the statutory offense of capital murder, pursuant to Virginia Code Section 18.2-31, subsections (8) and (13). He was also charged with use of a firearm in the commission of murder.

3. On January 21, 2003 indictments for those same three offenses were returned by the Grand Jury of Fairfax County.

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CLERK OF CIRCUIT COURT  
FAIRFAX, VA

4. Prior to the initiation of any criminal prosecution in Virginia, the United States commenced a federal prosecution of Lee Malvo for offenses involving the “same act” that gave rise to the Fairfax prosecution.

5. Thomas M. DiBiagio, the United States Attorney for the District of Maryland, brought a Criminal Information styled United States of America v. John Doe, Juvenile, in the United States District Court for the District of Maryland on October 29, 2002. John Doe was subsequently identified as Lee Boyd Malvo.

6. In the Criminal Information (Case Number 02-CR-0474) the United States Attorney charged, among other allegations, that:

On or about October 9, 2002 in the District of Maryland and elsewhere, the defendant JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from the State and District of Maryland to the Commonwealth of Virginia, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§1952 and 2. [underlining added]

7. The “crimes of violence, to wit, murders” that are alleged in the federal complaint” include, of course, the murder alleged in the Fairfax indictments. Both prosecutions are therefore based upon “the same act.” Virginia Code Section 19.2-294 therefore bars this “subsequent” Virginia prosecution in Fairfax County for violation of Virginia Code Sections 18.2-31(8) and 18.2-53.1 under its statutory protection against “former jeopardy.”

8. The federal Criminal Information began with three paragraphs alleging 1) “conspiracy” to affect commerce by extortion and the commission of physical violence in furtherance of that conspiracy; 2) the substantive offense of affecting commerce by extortion and the commission of physical violence; and 3) “conspiracy” to travel in interstate commerce with intent to commit murder to further a plan of extortion and thereafter to commit crimes of violence. [See attached

Exhibit A] All three counts allege these acts to have occurred in “Maryland and elsewhere” and allege offense dates of “prior to October 2, 2002 until October 24, 2002.”

9. Clearly again these charges and this federal prosecution were based upon the “same act” as the Fairfax prosecution. The term “elsewhere” is all inclusive. Virginia acts of violence were included in the federal Criminal Information by inference (Paragraphs 1, 2, and 3) and by specific mention (Paragraph 7). Section 19.2-294 bars further prosecution of murder under Section 18.2-31(8) and under Section 18.2-53.1.

10. “If, when a prosecution under a state law commenced, the accused could show that before that time there had been a prosecution against him under a federal statute for the same act, then the prosecution in the state court should be barred”. *Owens v. Commonwealth*, 129 Va. 757, 761, 105 S.E. 531 (1921); *Sigmon v. Commonwealth*, 200 Va. 258, 105 S.E.2d 171 (1958).

11. It is important to note that the Virginia legislature chose the phrase “if the same act be a violation of both a state and federal statute” rather than the phrase “if the same offense be a violation of both a state and federal statute” when it enacted Section 19.2-294. The clear meaning of the statutory language was to cover exactly the situation presented in the case at bar, where the offense charged may not be identical under the federal and state prosecutions, but the violative “act” is.

12. The defense has discovered that the Attorney General of the United States and the United States Attorney for the Eastern District of Virginia were forewarned and alerted to the fact that any Virginia prosecution would be precluded if Lee Malvo was “prosecuted under federal law, including the return of an indictment or a filing of an information made by a United States Attorney.” That warning was issued by an October 24, 2002 letter from the Hon. Jerry W. Kilgore, Attorney General of Virginia. [See attached Exhibit B]

13. Apparently this warning was not conveyed to United States Attorney DiBiagio prior to his commencing the federal prosecution of Lee Malvo by the criminal information of October 29, 2002.

WHEREFORE, the defendant, Lee Boyd Malvo, by his co-counsels, respectfully moves this honorable Court to dismiss this prosecution under Virginia Code Sections 18.2-31(8) and 18.2-53.1 as barred by former jeopardy pursuant to Virginia Code Section 19.2-294.

Respectfully submitted,

LEE BOYD MALVO / 

By \_\_\_\_\_ /

Co-Counsel \_\_\_\_\_

and

By \_\_\_\_\_

Co-Counsel  

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804-358-3947(Fax)  
VSB No: 16593

CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed,  
first class mail to:

Robert F. Horan, Jr., Esquire  
Commonwealth's Attorney  
4110 Chain Bridge Road  
Room 123  
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey  
Clerk  
Fairfax County Circuit Court  
Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush  
Judge  
Fairfax County Circuit Court  
Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, VA 22030-4009

this 13<sup>th</sup> day of May, 2003.

\_\_\_\_\_  
Co-Counsel

\_\_\_\_\_  
Co-Counsel

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

DEFENDANT'S  
EXHIBIT

A

UNITED STATES OF AMERICA

v.

*(Sealed)*  
CRIMINAL INFORMATION

JOHN DOE, JUVENILE  
*(See Boyd Malvo)*

CASE NUMBER: 02-CR-0474

The United States Attorney charges that:

1) From a time unknown but beginning prior to October 2, 2002 until October 24, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, did knowingly and willfully conspire with JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, to obstruct, delay and affect commerce and the movement of articles and commodities in commerce by extortion, and to commit and threaten physical violence to a person in furtherance of a plan or purpose to do so, in violation of 18 U.S.C. § 1951.

2) From a time unknown but beginning prior to October 2, 2002 until October 24, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly obstruct, delay and affect, and attempt to obstruct, delay and affect, commerce and the movement of articles and commodities in commerce by extortion, and did knowingly commit and threaten physical violence to a person in furtherance of a plan or purpose to do so, in violation of 18 U.S.C. §§ 1951 and 2.

3) From a time unknown but beginning prior to October 2, 2002 until October 24, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, did knowingly and willfully combine, conspire, confederate and agree with JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY to travel in interstate commerce with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter to commit crimes of violence to further the unlawful activity, in violation of 18 U.S.C. § 371 and § 1952.

4) On or about October 2, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from outside the State and District of Maryland to a place within the State and District of Maryland, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2.

5) On or about October 3, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from the State and District of Maryland to the District of Columbia, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2.

6) On or about October 7, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from the Commonwealth of Virginia to the State and District of Maryland, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2.

7) On or about October 9, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from the State and District of Maryland to the Commonwealth of Virginia, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2.

8) On or about October 22, 2002, in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly travel in interstate commerce from the Commonwealth of Virginia to the State and District of Maryland, with intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. § 1951, and thereafter committed crimes of violence to further the unlawful activity, in violation of 18 U.S.C. §§ 1952 and 2.

9) On or about October 2, 2002, at approximately 5:20 p.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. §§ 924(c) and 2.

10) On or about October 2, 2002, at approximately 6:02 p.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of

the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of James D. Martin through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

11) On or about October 3, 2002, at approximately 7:41 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of James Buchanan through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

12) On or about October 3, 2002, at approximately 8:12 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of Premkumar Walekar through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

13) On or about October 3, 2002, at approximately 8:37 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of Sarah Ramos through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

14) On or about October 3, 2002, at approximately 9:58 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 4 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of Lori Lewis Rivera through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

15) On or about October 3, 2002, at approximately 9:20 p.m., in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN



MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 5 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that violation, cause the death of Pascal Charlot through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

16) On or about October 4, 2002, at approximately 2:30 p.m., in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, and 3 above, in violation of 18 U.S.C. §§ 924(c) and 2.

17) On or about October 7, 2002, at approximately 8:09 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 6 above, in violation of 18 U.S.C. §§ 924(c) and 2.

18) On or about October 7, 2002, at approximately 8:09 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly and with reckless disregard for the safety of another, discharge a firearm that had moved in and that otherwise affected interstate commerce at a place that the defendant knew was a school zone, in violation of 18 U.S.C. §§ 922(q)(3)(A) and 2.

19) On or about October 19, 2002, at approximately 7:59 p.m., in the District of Maryland and elsewhere, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 7 above, in violation of 18 U.S.C. §§ 924(c) and 2.

20) On or about October 22, 2002, at approximately 5:56 a.m., in the District of Maryland, the defendant, JOHN DOE, Juvenile, aided and abetted by JOHN ALLEN MUHAMMAD, a/k/a JOHN WILLIAMS, a/k/a WAYNE WEEKS, a/k/a WAYNE WEEKLEY, did knowingly use and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit, the violations of 18 U.S.C. §§ 371, 1951 and 1952 described in paragraphs 1, 2, 3 and 8 above, in violation of 18 U.S.C. § 924(c), and did, during the course of that

violation, cause the death of Conrad Johnson through the use of the firearm, in violation of 18 U.S.C. §§ 924(j) and 2.

            
Date

15/  
Thomas M. DiBiagio  
United States Attorney



## COMMONWEALTH of VIRGINIA

Office of the Attorney General  
Richmond 23219

Jerry W. Kilgore  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804 - 786 - 2071  
804 - 371 - 8946 TDD

October 24, 2002

The Honorable John Ashcroft  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear General Ashcroft:

Thank you for your assistance in capturing the two suspects in the senseless shootings of our citizens. I commend the efforts of your staff and the staff of the Federal Bureau of Investigation for their professionalism and substantive assistance in this investigation.

The work of local and state law enforcement in Virginia, Maryland and the District of Columbia, as well as federal law enforcement, has been outstanding. These dedicated law enforcement officials have done a good job under extremely difficult circumstances in pursuing these twisted murderers. Because the murderers have acted in multiple jurisdictions, it is important that the prosecutors for the various jurisdictions work together to achieve justice.

As you know, the Commonwealth of Virginia has tested and proven criminal statutes under which these murderers can be tried and sentenced to death. Virginia's laws, however, have a provision that would preclude a state-based prosecution if these suspects are prosecuted under federal law, including the return of an indictment or a filing of an information made by a United States Attorney. *See* Va. Code. Sec. 19.2-294.

As you previously indicated, you believe that Virginia's and Maryland's laws are strong and appropriate for prosecuting these murderers. In consideration of your position, and on behalf of Virginia's Commonwealth Attorneys who are responsible for prosecuting criminals under Virginia's laws, I request that the United States District Attorneys for Maryland and Virginia (as well as the District of Columbia) not preempt state law and instead allow Virginia and Maryland to prosecute the alleged murderers under our respective state statutes.

Hon. John Ashcroft  
October 24, 2002  
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This has been an unprecedented example of cooperation between the federal, state, and local law enforcement. Thank you for your leadership under these difficult circumstances.

appreciate your assistance in this urgent matter.

Sincerely,

Jerry W. Kilgore  
Attorney General

cc: Hon. Mark Warner, Governor, Commonwealth of Virginia  
Paul J. McNulty, U.S. Attorney, Eastern District of Virginia  
Paul B. Ebert, Commonwealth Attorney, Prince William County,  
Robert F. Horan Jr., Commonwealth Attorney, Fairfax County  
William F. Neely, Commonwealth Attorney, Spotsylvania County  
Kirby H. Porter, Commonwealth Attorney, Hanover County